No. 3126

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

APPELLEE'S BRIEF

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

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STATEMENT OF CASE.

This suit was brought for the purpose of setting aside a certain conveyance made by the bankrupt, Alec Murray, to James A. Murray.

The property in controversy is known as the "Auditorium Building," situate in the City of Pocatello, Bannock County, State of Idaho. It was acquired by purchase at a Sheriff's Sale by E. L. Chapman and Carrie Chapman, under deed bearing date December 8, 1906, (Trans. page 40) and was subsequently transferred to the Monidah Trust, a corporation of the State of Delaware, under deed bearing date January 5, 1907, and a deed conveying the same property, between the same parties, bearing

date June 1, 1907. Subsequently, by deed dated January 5, 1912, recorded in Book 21 of Deeds, page 550, on June 8th, 1912, the Monidah Trust conveyed the property to Alec Murray. Thereafter Alec Murray under date of June 8, 1912, conveyed a one-half interest to George Winter, and subsequently George Winter reconveyed said one-half interest to Alec Murray, and under date of December 29, 1914, Marion Winter conveyed a one-half interest in said property to Alec Murray. On March 5, 1917, Alec Murray, by deed, conveyed said property to James A. Murray, the appellant defendant, for consideration named, One Dollar, recorded in Book 31 of Deeds at page 462; all of these deeds being of record in the office of the County Clerk and Recorder of Bannock County, State of Idaho, where said property is situate; and all of said deeds and records refer to the said "Auditorium Building," in question herein (Trans. pages 40 and 41). All of said deeds are the common warranty deeds carrying the usual habendum clause(Trans. page 74). The deed dated March 5, 1917, from Alec Murray to James A. Murray was without consideration (Trans. pages 55 and 60). The said "Auditorium Building" has never stood on the records of Bannock County, State of Idaho, in the name of James A. Murray (Trans. page 57). During the time said "Auditorium Building" stood in the name of said Alec Murray, upon the records of Bannock County, State of Idaho, the taxes were assessed to and paid by the said Alec Murray upon said property. (Trans. pages 48 and 49, also 58 and 59). During the same period of time various persons advanced credit to the said Alec Murray in

reliance upon the ownership by the said Alec Murray of the said Auditorium property and the records of Bannock County, State of Idaho, showing said ownership (Trans. pages 42 to 52).

ARGUMENT AND AUTHORITIES.

Appellant herein, in his first specification of error, in our opinion, has set forth the controlling contention and it appears to us that his entire argument, stripped of its verbiage and collateral matter, is confined to the question set forth therein, as to whether a trust was ever made or created, obligating the bankrupt to transfer the property in dispute to the appellant defendant.

If this be the correct theory of appellant's argument, then it seems to us, at the outset, that we are confronted with few salient features set forth by statutes and decisions of the courts.

Section 60, Subdivision "A" of the Bankruptcy Act of 1898 as amended says:

> "PREFERRED CREDITORS.—(a) A person shall be deemed to have given preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudicated, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering

of the transfer, if by law such recording or registering is required.''

Section 70, Subdivision ''E'' of the same act says:

''The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

We take it that under the above Section and subdivisions quoted, the appellant raises only the question as to whether in fact, James A. Murray, appellant defendant, made a parol trust agreement touching the Auditorium property and if that question be answered in the negative, then appellant must fail, having conceded all other questions. In approaching this question, it should be remembered that the title to the property involved never vested in James A. Murray and also that Alec Murray, Bankrupt, while the record owner of the property, dealt with it as his own individual property and procured credit thereon upon the faith and representations of such ownership; that is to say, James A. Murray, well knowing the facts concerning the record title of the property and of the conduct of Alec Murray in handling such property, voluntarily permitted said Alec Murray to hold out to the world that he was the absolute

owner of the property and procure credit indiscriminately, using such property as a basis for such credit (Trans. pages 42 to 52, also pages 58 and 59).

It is to be remembered by the court in considering the conduct of the appellant defendant, as to a parol trust agreement, that at no time, so far as the record discloses, was there ever any writing effecting such a trust relationship (Trans. page 58). In this regard, having in mind that the deeds through which title to the property herein in dispute is deraigned are the usual warranty deeds, in each instance, with the usual conveyances running to the grantee, and the usual habendum clause, we quote Section 3112 of the Revised Codes of the State of Idaho, which reads as follows:

> "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."

In the face of these record deeds, the appellant defendant attempts to make out a parol trust agreement entered into at the time the Monidah Trust, a corporation, under date of June 5, 1912, conveyed the property to Alec Murray, Bankrupt (Trans. page 54), and we might add here that the persistent attempts of the appellant to make James A. Murray and the Monidah Trust, a corporation, one and the same person, cannot be acquiesced in by us. We insist that James A. Murray of Butte, Montana, is one person and the Monidah Trust, a corporation of the State of Delaware, is in law a separate and distinct entity. We assume this is elementary

and needs no discussion. Objection was made by counsel at the time this parol agreement was endeavored to be established during the trial, and we take it that the court in its Findings of Fact adverse to the appellant defendant, sustained the objection of the counsel (Trans. page 54), based upon the Statute of Frauds found in the Revised Codes of the State of Idaho in Section 6007, which reads:

> "No estate of interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

This section has been construed repeatedly by the Supreme Court of the State of Idaho, to the effect that some writing is necessary to establish the contract relationship between the parties.

In Thompson vs. Burns, 15 Idaho, 572, wherein authorities are reviewed, the court after quoting Section 6007, says:

> "The rule established by that statute, the Legislature considered necessary for the security of property and titles and it has become a well established rule, both in this country and in England."

See also Coughanour vs. Grayson, 19 Idaho, 255.
McReynolds vs. Harrigfeld, 26 Idaho, 26.
Allen vs. Kitchen, 16 Idaho, 133.

McGinness vs. Stanfield, 6 Idaho, 372, at page 372, after quoting Section 6007, holds:

"Under the statutes we are unable to hold that title to real estate or an interest in real estate can be established by proof of a verbal transfer."

And in the syllabus by the court:

"Under the statutes of Idaho a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract."

Turner vs. Gumbert, 19 Idaho, 339, holds:

"Declarations made by a grantor prior to the execution of a deed and inconsistent with the execution of such deed, are not admissible in evidence."

If further authority is needed to support our contention, we cite the case of Smith vs. Mason,55 Pac., 143, in which case the California Supreme Court, passing upon a section of the California code from which Section 6007 of the Idaho Codes was copied, at page 143 said:

"Plaintiff offered evidence of declarations of Daniel Hoover, uttered orally regarding his purpose in executing said deed, and of oral admissions of defendant relative to her title in the land. Such evi-

> dence was rightly rejected by the court. Our statute of frauds forbids an express trust in lands to be created or declared otherwise than by a written instrument.''

after which quotation a line of authorities is cited.

Section 3169 of the Revised Codes of the State of Idaho provides:

> ''Every transfer of property, or charge thereon and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void as against the creditors, existing or subsequent of such person.''

This section seems to us to be in itself conclusive so far as the statutes of Idaho are concerned, against the transfer by Alec Murray, Bankrupt, to James A. Murray of the property in question.

Johnson vs. Sage, 4 Idaho, 764, holds:

> ''In view of the fact that the alleged sale was in trust for the benefit of the grantor and also for the further fact that it was made for the purpose of hindering other creditors from their demands and of the further fact that the Manager was not authorized to make such sale, and transfer, the attempted sale and transfer of such property was void.''

We fail to understand appellant's cotention to the effect that this statute does not apply (Appellant's Brief

page 40). The statute is plain and under the facts in this case a clear preference was given to James A. Murray, and the other creditors were delayed.

If we should concede that the testimony of appellant defendant to establish a trust was admissible, let us pause a moment to see what that testimony is. (Trans. page 55). The question appears, upon examination of appellant defendant:

> Q. At the time you conveyed it to him, did you have an understanding that he was to reconvey it to you or to anyone else you might designate?
>
> A. No, no agreement.
>
> Q. You had an oral agreement, did you not?
>
> A. Yes, sir; I didn't think we needed anything more.

At page 58 of the transcript appears the following:

> Q. The agreement between the Monidah Trust Company and Mr. Murray was not in writing?
>
> A. No writing between us.
>
> Q. No writing between you and Mr. Murray?
>
> A. No, sir.
>
> Q. You said no distinct agreement but just a general understanding?
>
> A. Yes, sir.
>
> Q. You placed the property in his name and allowed it to stand, with the understanding that when you wanted it you could get it back.
>
> A. Yes, sir.

At page 62 of the transcript, the witness James E. Murray testified that there was an understanding that Alec was to deed it back to Mr. Murray or anyone he might name and that "as stated by Mr. James A. Murray he was to hold the property for him and reconvey it to him or to anyone whom he might name."

At pages 64 and 65 of the transcript appears the following testimony in the cross examination of Mr. James E. Murray:

> Q. Were you present at the time a trust was created between Alec Murray and James A. Murray?
>
> A. I was present.
>
> Q. Can you give the conversation?
>
> A. Nothing more than that Mr. Murray said he would convey the property to him and it should stand in his name but at any time he wanted the property reconveyed, he would expect him to do so.

That, so far as the record discloses, we believe, is the only testimony concerning the parol trust agreement and we cannot better comment upon that testimony than by using the words of the learned trial Judge in his memorandum decision, in passing upon this case:—

> "In the instant case the bankrupt was not called as a witness, and it is to be noted that the defendant avoided any direct statement of a trust agreement. After stating that he had "no particular agreement" with the bankrupt at the time the property was conveyed, and that there was nothing said about holding the title in trust, only some general understanding, he was asked by his counsel the question, "At the

> time you conveyed it (the property) to him (the bankrupt), did you have any understanding that he was to convey it to you or to anyone else you might designate,'' to which he replied, ''No, no agreement.'' Then to the extremely leading question, ''You had an oral agreement, did you not?'' he responded, ''Yes, sir. I didn't think we needed anything more.'' And upon cross examination he stated that there was no distinct agreement, just a general understanding. He doesn't testify as to what, if anything, he said, or what, if anything, the bankrupt said, nor does he explain how or why he got such a ''general understanding,'' or attempt to give any reason for having the transfer made by the Monidah Trust Company which he had apparently organized for the very purpose of holding the title to such property.''

Reverting again to our suggestion that James A. Murray of Butte, Mont., and the Monidah Trust, a corporation of the State of Delaware, are distinct persons in law, we are impelled to ask the question, ''Why did this corporation show such unusual interest in Alec Murray?'' In answer to this question, we may find something of interest in the case handed down by the Idaho Supreme Court in the case of the City of Pocatello, a municipal corporation, vs. James A. Murray, doing business as the Pocatello Water Company, 23 Idaho 447, which case was referred to by counsel for the appellee in examination of James A. Murray (Trans. page 57), wherein the witness said, ''I had considerable litigation against the City of Pocatello and at one time the City of Pocatello acquired quite a large judgment against me in the State Court, but I am not aware of the proceedings had in that case. At that time the record title stood in Mr. Winter for one-half

interest and Mr. Alec Murray for one-half interest. That arrangement was in accordance with my order and the proceedings had in that case were under my order. Whatever was done in that case by Alec Murray was under my order and under my direction."

We are disposed to believe this testimony of Mr. Murray and further believe that the reason the property conveyed by the Monidah Trust, a corporation, formed apparently by Mr. James A. Murray to enable him to more advantageously handle his business, was made in good faith as a gift to enable Mr. Alec Murray and Mr. George Winter to qualify as tax-payers in said case of the City of Pocatello vs. Murray. In that case at page 453 the court says:

> "An affidavit was also filed on behalf of the defendant by Alex Murray, in which he says that he is the owner of property in Pocatello subject to taxation and which was taxed therein, and that such property is an undivided one-half interest in the real property situated in said City of Pocatello known as the Auditorium, which property appears upon the assessment roll of said city and county for the year 1912 in the name of Monidah Trust, a corporation, and that since the 5th day of June, 1912, affiant has owned in fee simple the title to a one-half undivided interest in said property, and the other one-half interest in said property has ever since the 8th day of June, to the knowledge of affiant, been owned in fee simple by George Winter, co-commissioner of affiant, and superintendent of the Pocatello Water Company, and agent and representative of James A. Murray; that said property was regularly and duly assessed in said city and county by the assessor thereof for the year

> 1912 at $25,798, the total tax for said year being $830.68, one-half of which said tax, $415.34 was paid to the tax collector of said Bannock County within the time allowed therefor and prior to the same becoming delinquent for the said year 1912; that one-half of said sum so paid was paid by, for and on behalf of said George Winter; that the affiant was appointed a commissioner and notice of such selection was served on the Mayor of the city and a receipt of such notice was acknowledged by the mayor, and on the 28th day of January, 1913, affiant received from the commissioners appointed by the city the same notice as is set out in the affidavit of Winter, and in pursuance of such notice he attended the meeting and participated in the proceedings.''

It is to be remembered that Mr. James A. Murray according to his above-given testimony had considerable financial interest at stake at that time and every reason of his interest, as well as law, demanded that Mr. Alec Murray and Mr. George Winter own some real estate in the State of Idaho. Certainly it must be that if the position of the appellant defendant taken in said case is true, then the representations and contentions made by him in the present case, to the effect that the property in question was held in trust, is not true. We further believe that the comment of the court in said case still holds true: (23 Idaho, 458)

> ''It is also alleged in the answer, and the facts so alleged are clearly supported by the evidence, that George Winter and Alex Murray were joint owners of the property in the City of Pocatello, Bannock County, Idaho, each owning a one-half interest, to the value of $25,000.00 and that such property was

acquired by deed conveying a fee simple title executed upon the 8th day of June, 1912, and that such property was regularly and duly assessed in said city and county by the assessor thereof for the year 1912 at $25,798, the total tax for said year being $830.68 and that one-half of said tax, $415.34, was paid to the tax collector of Bannock county within the time allowed therefor and prior to the same becoming delinquent for said year, and that one-half of said sum so paid, was paid by and for and on behalf of George Winter, and the other half paid by Murray upon the one-half interest he owned in said property.

If this be true, Winter and Murray were joint owners of said property and the title was taken in the name of Murray and the property was assessed to Murray and each of the joint owners paid his proportionate share of the taxes assessed and paid upon said property. From these facts it necessarily follows that each of said parties was a tax-payer within the meaning of the statute in controversy in this case. A tax-payer is one who owns property within the municipality, and who pays a tax or is subject to and liable for a tax. The qualification, however, would not apply to a person who actually owns property and who wilfully and purposely covers up his ownership and conceals his title for the purpose of avoiding the payment of taxes."

It seems strange to us that the appellant defendant can, with good conscience, press his contention in this case in the face of his former position and we cannot believe that a court of equity will permit him to adapt his position to suit the circumstances of any particular case wherein the same property is involved. In the case above cited at page 460 the court said: "We conclude therefore, and hold in this case that the record clearly shows that George Winter and Alec Murray were tax-payers at the time

they were appointed as such by the defendant and continued to be so up to the time this proceeding was commenced.

While as we have indicated above, the appellant defendant relies upon the express parol trust agreement, out of an abundance of caution we wish to call to the court's attention a few cases touching upon the question of resulting trust as an attempt may be made to invoke the principles in this case—that is to say, since Section 3112 of the Revised Codes of the State of Idaho abrogated the common law rule of equity as to resulting trusts in the absence or failure of consideration, express or implied, we take it that as fraud or mistake is not suggested by appellant defendant, no resulting trust, in favor of James A. Murray can be held under the deed of June 5, 1912 made by the Monidah Trust to Alec Murray, for in the deed referred to, the conveyance is absolute in form and the habendum clause declares the use and benefit or interest of the property to be in the grantee and this cannot be affected by an oral contrary declaration by the grantor at the time of the conveyance.

Gaylord vs. Gaylord, 150 N. Car. 22;
Verzier vs. Convard, 71 Conn. 1;
McDonald vs. Stow, 109 Ill. 40;
Gould vs. Lynde, 114 Mass. 366.

Farrington vs. Barr, 36 N. H. 86, holds in point that if the deed states a good consideration there is no resulting use or trust in favor of the grantor, although in fact the deed be without consideration.

Donlin vs. Bradley, 119 Ill. 412, holds that where the habendum clause provides the grantee shall hold the premises, etc., to the only proper use, etc., the grantees, their heirs, etc., the benefit, interest is expressly limited to the grantee and no resulting trust in favor of the grantor can be had.

Coffee vs. Sullivan, a New Jersey equity case, 45 Atl. 520, holds that a trust cannot be implied in favor of the grantor of land, the deed operating under the statute of use, the habendum clause declaring the use to be for the grantee, an express trust not manifest in writing made by a grantee of a deed of conveyance of lands in favor of the grantor, is void under the statute of frauds.

The Supreme Court of Iowa, in the case of Acker vs. Priest, 61 N. W. 235, in holding to the same effect, has the following to say:

> "Mr. Pomeroy, in his excellent work on Equity Jurisprudence (section 103), says: "All true resulting trusts may be reduced to two general types : (1) Where there is a gift to A., but the intention appears from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest, or only a part of it. In order that a case of this kind may arise, there must be a true gift, so far as the immediate transferee, A., is concerned; the instrument must not even state a consideration, and no valid, complete trust must be declared in favor of A., or of any other person, * * * . If the conveyance be by deed, the trust will result to the grantor. * * * The deed in the case at bar both recites a consideration and declares a beneficial use in favor of the grantee, and it is ap-

parent that no resulting trust of the first class arose in favor of Mrs. Priest.''

Again the claim of the *cestui que trust* will not prevail as against a creditor who was misled or defrauded by reason of the trust being kept a secret one by some voluntary act of the *cestui que trust,* especially where efforts were made by the creditors to ascertain the true relations,

Campbell vs. Campbell, 79 Ky. 395,

and further there can be no constructive trust in this case for the reason that no fraud is alleged on the part of Alec Murray at the time the deed was given by the Monidah Trust to him.

Judge Frank Irvine, in his article on Trusts, 39 Cyc. 179, says: ''Where there is no relation of trust or confidence between contracting parties other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance, no trust arises by virtue of a verbal agreement in respect to the purchase of lands and a subsequent refusal to execute it, or a denial of its existence, if there is no fraud, undue influence or other wrongful acts, etc.''

We wish to point out specifically that this is not a case where A., being in possession of funds of B., purchases lands and subsequently attempts to exercise fee simple rights as against B.

Motherwell vs. Taylor, 2 Idaho 254, in the syllabus by the court says: ''A resulting trust is raised only when there is fraud in the acquisition of title or where the

money of one is used to pay for real property, the title to which is taken in the name of another at the time said title is taken, and neither a promise to pay nor after payment will give rise to such a trust."

In the case of Lewis vs. Lewis, 3 Ida. 645, the court in its opinion adopts the following language from the case of Olcott vs. Bynum, 17 Wall. 44, wherein the court said:

> "Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after advances or funds subsequently furnished."

We dismiss appellant's contention with respect to the recording laws of the State of Idaho with the statement that the sections cited are for the purpose of protecting purchasers and mortgagees.

With respect to appellant's argument concerning the divesting of property held for creditors under the doctrine of estoppel, we do not deem this matter in point, for the reason that Alec Murray, at all times in question, was the holder and owner of the fee simple title to the Auditorium property. We are not endeavoring in this case to enforce specific liens as appellant seemingly contends, but are asserting our right, as we conceive it, under the Bankruptcy acts of Congress. As heretofore cited in section 70 "E", "unless the appellant is a *bona fide* holder for value prior to the date of adjudication, the property may be recovered or its value collected."

We cannot better state our surmise with respect to the transfer of the Auditorium property by the Monidah

Trust to Alec Murray than by employing the words of the learned trial Judge in his memorandum decision (Trans. page 32) :—

> "I am convinced that he (James A. Murray) intended that the bankrupt should take absolute title to the property so completely that both he and the bankrupt could, without committing perjury, take oath that it belonged to the latter. He hoped and may have even expected that ultimately the bankrupt would reconvey it to him in consideration of the large interests which he had at stake. He may very well have been willing to take the chance which when he considered the relation—both of kinship and of employment, he probably thought was not great; but it still remains true that he gave the property to the bankrupt without any reservations, conditions or qualifications. It is immaterial that he hoped to get the property back. The giving of a gift with the hope that the donee will some time return it or its value, does not operate to create a trust or charge the donee with a trusteeship. For his own purpose the defendant was under the necessity of making an absolute transfer. To have put the property in trust would have been futile."

To recapitulate, our position is that the appellant defendant is not permitted to show a parol trust agreement involving the property in question at the time conveyance was made by the Monidah Trust to Alec Murray, bankrupt, and secondly that no resulting or constructive trust is established in favor of James A. Murray, for the reason that the testimony given, in its most favorable light, fails to show anything beyond a mere hope expressed in the words "general understanding." Both under the statute

of frauds and forbidden transfers in the State of Idaho, such a transaction as the appellant defendant seeks to enforce is prohibited, and we insist that in this case the Monidah Trust, a corporation of Delaware, through the power and influence of James A. Murray, in fact made a gift of the property in question to Alec Murray, and that the purported defense of a parol trust agreement is fraudulent and fictitious, as against the *bona fide* creditors of the insolvent estate, there being no trust of record or none in fact, known to the world or creditors of the estate. Any secret relations or equities existing between James A. Murray and Alec Murray, unknown to the world or the creditors of the insolvent estate, cannot be held, in our opinion, to override the *bona fide* claims of indebtedness, against the estate of the bankrupt. Under the statutes of the State of Idaho no secret equities can prevail against a record title, the common law rule having been abrogated and we canot see how in good conscience the Court can hold otherwise than as stated by the learned trial Judge:

"If it be said that a moral consideration is to be found in the fact that the bankrupt paid nothing for the property, and may have always intended to re-deed it to the defendant, the reply is that to convert such a moral consideration into a legal one would be to transform a transaction of doubtful propriety into an odious fraud." (Trans. page 34).

Respectfully submitted,

J. M. Stevens,

Solicitor for Appellee.